Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ANTHONY SHORT

Petitioner

v.

EDISON CHOUEST OFFSHORE, INC. ET AL

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is a Jones Act seaman entitled to have his maritime personal injury action adjudicated pursuant to Federal Jones Act and General Maritime Law principles rather than the unique law applied in this case by the Alabama Supreme Court.

2. Is uniformity of law required among the various courts of this country in Jones Act and General Maritime Law cases.

LIST OF THE PARTIES

Edison Chouest Offshore, Inc.

Galliano Marine Service, Inc.

Grand Isle Offshore, Inc.

Holiday Offshore, Inc.

North America Boat Rentals, Inc.

North American Towing, Inc.

Anthony E. Short

TABLE OF CONTENTS

	Page
Questions Presented for Review.....	i
List of Parties.....	11
Table of Contents.....	iii
Table of Authorities.....	iv
Citations to Opinions Below.....	1
Statement of the Grounds for Jurisdiction.....	2
Constitutional Satutory Provisions Involved.....	3
Statement of the Case.....	4
Argument and Citation to Authorities.....	12
Conclusion.....	21
Appendix A.....	24
Appendix B.....	35

TABLE OF AUTHORITIES

	Page
Beadle v. Spencer, 298 U.S. 124, 80 L.Ed. 1082, 56 S.Ct. 712 (1936).....	18
Coastal Iron Works, Inc. v. Petty Ray Geophysical, 783 F.2d 577 (5th Cir. 1986).....	20
Continental Oil Company v. Bonanza Corp. 677 F.2d 455, 461 (5th Cir. 1982), on rehearing 706 F.2d 1365 (1983) (en banc)...	20
Cortez v. Baltimore Insular Line, Inc. 287 U.S. 637, 77 L.Ed. 368, 53 S.Ct. 173 (1932).....	12
Cosmopolitan Shipping Company v, McAllister, 337 U.S. 783, 93 L.Ed. 1692, 69 S.Ct. 1317, (1949).....	12
Kamani v. Port of Houston Authority, 702 F.2d 612, 614 (5th Cir. 1983).....	20
Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944).....	18
Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 941 (1960).....	18

Powell v. Offshore Navigation, Inc., 644 F.2d 1063, 1065 (5th Cir. 1981), cert.den. 454 U.S. 972, 102 S.Ct. 521, 70 L.Ed.2d 391 (1981)..... 20

Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 100 L.Ed. 668, 76 S.Ct. 608 (1956)..... 14

Seas Shipping Company v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946)..... 17

Sentilles v. Inter-Caribbean Shipping Corporation, 361 U.S. 107, 4 L.Ed.2d 142, 80 S.Ct. 173 (1959)..... 15,22

Usner v. Luckenbach Overseas Corporation, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed. 562 (1971)... 17

CITATIONS TO OPINIONS BELOW

The decision from which Petitioner seeks relief is officially reported as Anthony Short v. Edison Chouest Offshore, Inc. et al, _____ So.2d _____(Ala. 1994, Case Number 1921522). That Opinion is set out as Exhibit A of the Appendix. Since the Alabama Supreme Court simply adopted and quoted as its own in toto the Order of the Mobile County, Alabama Circuit Court granting Summary Judgment in favor of Respondent and against Petitioner, that Order is not copied, but reference is made to the Alabama Supreme Court Opinion cited above.

STATEMENT OF THE GROUNDS FOR JURISDICTION

The Judgment of the Alabama Supreme Court was rendered on February 4, 1994. An Order denying a rehearing was entered on March 18, 1994.

The jurisdiction of this Court is invoked under 18 U.S.C. Sec. 1257, 28 U.S.C. Sec. 1333, and Supreme Court Rule 10.

STATUTORY PROVISIONS INVOLVED

The Jones Act, 46 U.S. Code, Sec. 688.

STATEMENT OF THE CASE

This is an Admiralty action. The Petitioner, Anthony E. Short, is a seaman who worked for fifteen years in the exclusive employ of respondents. During those fifteen years Petitioner, in the course of his employment, was exposed to numerous known and unknown chemicals while engaged in cleaning chemical tanks as a seaman on Respondents' vessels. As a result of such exposure to various chemicals, Mr. Short developed occupational induced asthma and is now totally disabled.

Petitioner filed an action under the Jones Act and General Maritime Law on May 11, 1992, in the Alabama State Court at Mobile, Alabama, under the Savings to Suitors Clause of the U. S. Constitution, with jury trial as to all issues demanded. The complaint states that as a seaman, Mr.

Short was engaged as a part of his duties in cleaning by broom sweeping and other methods, various chemicals from cargo tanks without being furnished proper respirators or chemical dust masks, that he was exposed to large quantities of various chemical dusts, sprays, mists and fumes in his work onboard the Respondents' vessels and the exposure to the various chemicals resulted in the development of his disabling occupational asthma. The complaint further alleged that in requiring Plaintiff to work in chemical and dust laden atmospheres without proper respiratory protection, Respondents were negligent and negligently failed to provide a safe place to work or seaworthy vessels. The complaint also sought maintenance and cure.

After substantial discovery, the Respondents filed a Motion for Summary

Judgment supported by the deposition of treating physician Dr. Gaeton D. Lorino, expert Dr. Richard Deshazzo and affidavits by two of Respondents' employees.

Mr. Short filed a Response and Memorandum in Opposition to the Motion for Summary Judgment and demanded oral argument, supported by deposition and affidavit of treating physician Dr. Gaeton D. Lorino, excerpts from the deposition of Defendants' Safety Manager, deposition of a fellow employee David Nelams, affidavit of Mr. Short, and excerpts and exhibits attached thereto, including various Material Safety Data Sheets prepared according to applicable laws showing the health hazards of some of the chemicals to which he was exposed during the course of his employment, a description of the inadequate respiratory protection provided, and the

affidavit of expert Lessard. There were various other affidavits and depositions before the court from previous proceedings.

The defendants' motion for summary judgment was set for oral argument on Friday, June 18, 1993, but notwithstanding, the Court entered an Order granting the motion without notice to plaintiff or counsel, entering a Final Judgment against petitioner Short on June 16, 1993. On June 18, 1993, plaintiff filed a motion to vacate the order on summary judgment and requested oral argument, which motion together with a subsequent motion to vacate was summarily denied without oral argument, from which Mr. Short filed a Notice of Appeal to the Alabama Supreme Court on July 9, 1993, and requested oral argument.

The summary judgments granted by the trial court were affirmed without oral

argument on February 4, 1994, and an application for rehearing was denied on March 18, 1994.

The Alabama Supreme Court had before it the uncontradicted testimony of Mr. Short's treating physician, who stated his opinion to a reasonable degree of medical certainty that Mr. Short has occupational asthma caused by his exposure to various chemical dusts, mists and fumes while working on respondent Edison Chouest vessels, that he was exposed to those chemicals for fifteen years without proper respiratory protection, and that the various chemicals to which Mr. Short was exposed were allergens known to cause occupational asthma, and that many of the chemicals to which he was exposed were shown on the product data sheets to be asthma triggers, and that anyone exposed to

such chemicals in high concentrations over an extended period of time such as the time Mr. Short worked for respondents, would be susceptible to developing occupational asthma.

The doctor went so far as to say that in his opinion the materials to which Mr. Short was exposed during the 15 years that he worked for respondents did cause Mr. Short to develop occupational asthma, that no one single chemical can be singled out as "the cause" of such occupational asthma, although the list of chemicals contained in Mr. Short's affidavit, contained several which are known to trigger asthma and which are known to have caused occupational asthma.

The doctor continued by stating that it was the totality of the exposure over a period of years to the large quantities of

various known and unknown chemicals which resulted in Mr. Short's occupational asthma. In the doctor's opinion it would be impossible to determine the exact chemical that triggered the illness. The doctor further testified that many of the various chemicals to which Mr. Short was known to have been exposed while in the employment of the respondents were not harmless substances if breathed over a period of time in heavy concentrations and in his opinion the various chemical dusts, mists, or any one of them, to which Mr. Short was exposed in the course of his employment with Edison Chouest <u>was the causative agent of his occupational asthma.</u>

There was also before the court testimony that for approximately fifteen years Mr. Short was supplied with insufficient respiratory protection, that no

respiratory protection program was set up by respondents, that respondents did not know to what chemicals their employees were exposed and the court had before it the testimony of Safety Consultant Lessard that failure to provide proper dust protection for tank cleaning was an actual violation of numerous OSHA and U.S. Coast guard regulations.

There were no facts before the court that contradict Dr. Lorino's sworn opinion that the chemicals breathed by Tony Short in heavy concentrations during 15 years of work onboard respondents' vessels did cause his occupational induced asthma and that such chemicals were not harmless when breathed in substantial quantities. There were no facts before the court upon which the court could have found that the chemicals breathed by Mr. Short were

"harmless substances."

Notwithstanding that there is ample Federal law on all aspects of Mr. Short's claim, the Alabama Supreme Court fashioned a unique theory in approving the dismissal by summary judgment of Mr. Short's Jones Act and General maritime Law claim, which theory stated that the seaman, despite the medical testimony as stated above, had no cause of action unless that seaman could identity the single substance which triggered his occupational asthma and that the respondent vessel owners must have known prior to exposing Mr. Short to the chemical that such single chemical could cause occupational asthma or was harmful. In addition, the Alabama Supreme Court applied Alabama products liability law rather than applicable maritime law principles.

ARGUMENT AND

CITATIONS OF AUTHORITIES

The fundamental principle of maritime law is that a seaman is a "ward of the court" for which the Jones Act, 46 U.S.C.A. Section 688, was passed as remedial and welfare legislation creating rights for the seaman for damages arising from maritime torts. The statutory scheme, together with existing general maritime law was and is the only form of workers personal injury compensation available to a seaman and was intended to give protection to that class of individuals and to those dependent upon their earnings. Cosmopolitan Shipping Company v. McAllister, 337 U.S. 783, 93 L.Ed. 1692, 69 S.Ct. 1317 (1949); Cortez v. Baltimore Insular Line, Inc., 287 U.S. 637, 77 L.Ed. 368, 53 S.Ct. 173 (1932).

Since the statutory and general maritime law compensation scheme for seamen is an exclusive and comprehensive remedy, an injured seaman should be able to go to any jurisdiction in the country and have his Jones Act/General Maritime Law claims adjudicated pursuant to the same substantive law and burdens of proof. If the Courts of the State of Alabama fail to follow the Jones Act as mandated by Congress and the General Maritime Law as enunciated by this Court, to the detriment of the seaman's rights, this Court should allow certiorari so as to insure the uniform treatment of seamen.

This Court is the only forum available for a seaman who is seeking to require the highest court of his home state to apply to him the same standards and laws applied to seamen by other forums.

The medical evidence in this case is uncontested. Anthony Short was exposed to large quantities of various chemicals, including cement dust, for some fifteen years while employed by Edison Chouest. Competent doctors have diagnosed Mr. Short as having "occupational asthma," resulting from his exposure to the various chemicals and dusts to which he was exposed while in the respondent shipowners' employ.

The law is well established that if there is any evidence that the vessel owner/employee has failed to provide a safe place to work and there is some proof of circumstances from which it can be reasonably inferred that the injury resulted from that failure, then Mr. Short having demanded a jury trial, is entitled to a jury trial. Schulz v. Pennsylvania Railroad Company, 350 U.S. 523, 100 L.Ed.

668, 76 S.Ct. 668 (1956).

This Court had before it a very similar case in Sentilles v. Inter-Caribbean Shipping Corporation, 361 U.S. 107, 4 L.Ed.2d 142, 80 S.Ct. 173 (1959) in which this Court specifically held that if there are several potential medical causes for a seaman's tuberculosis, any one of which can be attributed to the vessel, then the seaman has a cause of action which goes to a jury. The seaman does not have to show that a single instance or exposure from multiple possible causatives was the single cause of his injury.

The Alabama Supreme Court required a different and substantially higher burden in that the Alabama Supreme Court required that Anthony Short show which of the myriad of chemicals to which he was exposed was the cause or trigger of his asthma. That

increased burden is not merely a procedural difference from existing law as applied by this Court, but is new law unique to the State of Alabama.

Mr. Short's treating physician testified that he was convinced to a reasonable degree of medical certainty that Mr. Short was suffering from occupational asthma as a result of working on defendants' vessels (R. 454-455) and that there was a reliable history of Mr. Short's exposure to various chemicals (R. 488), that it was not necessary to identify a specific causative substance to diagnose occupational asthma and as a medical fact you cannot identify a specific substance as the trigger. (R. 450-451). The requirement by the Alabama Supreme Court that a seaman identify the specific substance onboard the vessel was apparently the result of a

mistaken impression that there could be no liability upon a shipowner unless the shipowner had actual advance knowledge of the onset of Anthony Short's occupational asthma; that the various chemicals to which the seamen employee was exposed, was a likely occupational asthma trigger, and that absent such advance knowledge there could be no liability. The application of the Alabama standard deprived Anthony Short of his seaman's workers compensation remedy.

Liability based upon unseaworthiness is wholly distinct from liability based upon negligence. Seas Shipping Company v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946); Usner v. Luckenbach Overseas Corporation, 400 U. S. 494, 91 S.Ct. 514, 27 L.Ed. 562 (1971). Unseaworthiness is a condition and whether

a shipowner had advance knowledge that a condition created by him might trigger disabling occupational asthma in one of his seamen is irrelevant to the owner's liability. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 941 (1960); Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944).

The failure of a shipowner to provide a crew of a vessel with a reasonably safe place within which to work gives rise to a cause of action under the Jones Act. Beadle v. Spencer, 298 U.S. 124, 80 L.Ed. 1082, 56 S.Ct. 712 (1936); Mahnich v. Southern S.S. Co., supra. Since Mr. Short was exposed for years to various chemical dusts without proper respiratory protection or a safety program in place to assure such respiratory protection, then the fact that

the shipowner did not have advance knowledge that one of the substances, or some combination of such could trigger asthma, does not mean that the seaman ipso facto loses his Jones Act remedy. The Alabama Supreme Court, in paragraph 7 of its Opinion, specifically stated that the law as applied by the court of Alabama, required that a seaman must identify a substance onboard defendant's vessel which substance was the causative agent of his occupational asthma before he can proceed under the Jones Act. That grossly increased burden effectively eliminated plaintiff's Jones Act remedy in Alabama, given the nature of his occupational illness.

The Alabama Supreme Court, notwithstanding the large body of Admiralty law available to it, also applied its own

version of product liability law to this seaman's claim. Although State law may supplement Maritime law where Maritime law is silent, Continental Oil Company v. Bonanza Corp., 677 F.2d 455, 461 (5th Cir. 1982), on rehearing 706 F.2d 1365 (1983) (en banc) or where a local matter is at issue, Kamani v. Port of Houston Authority, 702 F.2d 612, 614 (5th Cir. 1983), State law may not be applied where it would conflict with Maritime law. Powell v. Offshore Navigation, Inc., 644 F.2d 1063, 1065 (5th Cir. 1981), cert.den. 454 U.S. 972, 102 S.Ct. 521, 70 L.Ed.2d 391 (1981); Coastal Iron Works, Inc. v. Petty Ray Geophysical, 783 F.2d 577 (5th Cir. 1986).

This Court should accept certiorari to review the application of products liability law to a seaman's case. It is one thing for one or two individuals only

to complain of some adverse reaction to a highly popular brand of toothpaste. It is another matter entirely to apply those same principles of law to a seaman who is totally disabled as a result of harmful chemicals used in cleaning tanks on vessels and thereby deprive him of a valuable property right, i.e. his remedies under the Jones Act and General Maritime Law.

CONCLUSION

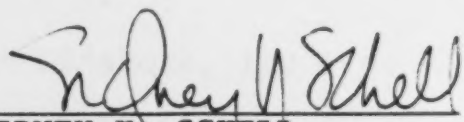
Petition does not ask this Court to grant certiorari to review evidence and discuss specific facts, or to weigh evidence in relation to specific facts. This petition asks this Court to give a measure of guidance to the Alabama Supreme Court so that uniformity remains among the various courts of the country in that special class of cases arising under the Jones Act and its Siamese twin, the

seaworthiness remedy. Sentilles v. Inter-Caribbean Shipping Co., supra, provides the precedent for this petition.

The only compensation remedy available to Anthony Short, a young man with a young family, now totally disabled, is his Jones Act General Maritime Law remedy. Mr. Short filed his claim in his State Court under the Savings to Suitors Clause of the U. S. Constitution, with the expectation that his case would be tried under the same laws and rules as if it had been filed in a Federal Court or in some other state court. Mr. Short was mistaken, and to his surprise and chagrin, the Alabama Supreme Court applied its own unique brand of law to his seaman's claims.

Certiorari should be granted to consider if there was indeed sufficient variance from the uniformity requirements

of Admiralty and Maritime Law to require a reversal, with instructions as to the proper law to be applied in this case, thus insuring that a seaman shall find the same law applied to his seaman's claims regardless of the forum in which such claim is filed.



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APPENDIX A

OPINION OF

SUPREME COURT OF ALABAMA

1921522

Anthony Short

v.

Edison Chouest Offshore, Inc., et al

Appeal from Mobile Circuit Court
(CV-92-001715)

STEGALL, JUSTICE.

The plaintiff, Anthony Short, appeals from a summary judgment entered in favor of the defendants in an action alleging liability under general maritime law and under the Jones Act for injuries Short claimed to have sustained during the course of his employment with the defendants. Short argues that the trial court resolved disputed facts and made findings of fact in

connection with the summary judgment and, therefore, that the trial court erred in entering the summary judgment in favor of the defendants.[1]

In its summary judgment order, the trial court stated:

> "This cause comes before the court on defendants' Motion for Summary Judgment. After considering all pleadings and other materials filed with the court, including defendants' brief in support of their Motion for Summary Judgment and plaintiff's brief in opposition thereto, the court makes the following findings of fact and conclusions of law.
>
> "FINDINGS OF FACT
>
> "1. The plaintiff is a resident of Mobile County and was employed by defendants from approximately 1977 through 1992. From 1978

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[1] The trial court's order, quoted at length in this opinion, names only one of the several defendants. The others are companies related to the one named.

through 1992, plaintiff was employed by defendant Edison Chouest Offshore, Inc. (hereinafter 'Chouest') Plaintiff served aboard Chouest boats in the capacities of mate and captain. (Plaintiff's deposition, pp. 7, 81, 85).

"2. During 1991, the plaintiff developed a physical condition characterized by dyspnea, shortness of breath and related respiratory symptoms, which first manifested itself while the plaintiff was ashore at an Exxon facility in Grand Isle, Louisiana. (Plaintiff's deposition, p. 61.)

"3. In April, 1992, the plaintiff's physician, Dr. Gaeton Lorino, diagnosed his condition as occupational asthma (Lorino deposition, p. 93.), a disease which, according to both Dr. Lorino and Dr. Richard D. deShazo, whose affidavit was submitted by the defendants, is an allergic disease. (deShazo affidavit, ¶ 3; Lorino deposition, p. 83) Specifically, according to Dr. deShazo, 'occupational asthma ... is a lung disease caused by the abnormal function of an individual's immune system and is, therefore, characterized as an allergic disease.' (deShazo

affidavit, ¶ 3.) Dr. deShazo further states that '[a]lleric asthma occurs when a harmless substance (for instance, pollen) is misperceived by the immune system as a pathogen. Thus, the immune system reacts to a harmless substance as it would to an actual pathogen by production of antibodies such as IgE, which is an abbreviation for immunoglobulin E.' (deShazo affidavit, ¶ 5.)

"4. Dr. Lorino, who made the diagnosis of occupational asthma, attributes the plaintiff's disorder to an allergic reaction to substances aboard the boats on which the plaintiff worked. (Lorino deposition, p. 83.)

"5. Significantly, neither the plaintiff nor his physician can identify any substance aboard defendants' vessels which caused this condition. Neither can the plaintiff or his physician identify the time or place of the plaintiff's exposure to any such unidentified substance. In fact, Dr. Lorino stated in his deposition that he did not 'know of any specific substances or names that [the plaintiff] was exposed to.' (Lorino deposition, p. 87.)

"6. If the plaintiff does in fact suffer from occupational asthma, then his condition was

caused by an abnormal, i.e., allergic response of the plaintiff's body which occurred as a result of exposure (at times unknown) to an allergen (which also is unknown). (Id.)

"7. The allergic condition of occupational asthma occurs infrequently and is found in only an exceedingly small percentage of the population. (deShazo affidavit, ¶ 7); Lorino depsition, p. 64.) Although the figures given by each of the doctors vary slightly, it is uncontested that occupational asthma is a disease which affects, at most, only one-quarter of one percent of the population. (deShazo affidavit, ¶ 7; Lorino deposition, p. 64.)

"8. Of the approximately three thousand five hundred (3500) or more different individuals who have served as crewmen aboard Chouest boats, only Anthony Short has asserted a claim against Chouest for occupational asthma or any other pulmonary problem during, or as a result of, service on Chouest boats. (Jack Smith affidavit, ¶¶ 2-3; Stacey Gisclare affidavit, ¶ 2.)

"CONCLUSIONS OF LAW

"1. Under the doctrine of unsea-

worthiness, a vessel owner is obligated to furnish a vessel and appliances which are reasonably proper and suitable for their intended use. Complaint of Merry Shipping, 650 F.2d 622 (5th Cir. 1981).

"2. Although the obligation imposed under the doctrine of unseaworthiness is absolute, it is an absolute obligation only to furnish a vessel and appliances which are reasonably fit. Italia Societa v. Oregon Stevedoring Co., 376 U.S. 315, 322 (1964). Thus, the doctrine of unseaworthiness does not require that a vessel owner furnish an accident-free or illness-free vessel. Id.

"3. A vessel cannot be deemed not reasonably fit for its intended use, i.e., cannot be deemed unseaworthy, if the vessel is not in some manner defective. See Waldron v. Moore-McCormack Lines, 386 U.S. 724, 726 (1967) (holding that 'the classic case of unseaworthiness arises when the vessel is either insufficiently or defectively equipped'; emphasis added).

"4. For plaintiff to prevail on his claim for unseaworthiness, plaintiff must establish that defendants' vessels or appliances

were in some manner defective, i.e., not reasonably fit for their intended use.

"5. The plaintiff is unable to identify any substance aboard any of defendants' vessels as the causative agent of his occupational asthma, and is thus unable to identify the instrumentality which caused his alleged injury.

"6. Since the plaintiff cannot identify the substance which triggered his occupational asthma, he cannot demonstrate that the presence of a substance constituted a defect aboard any of defendants' vessels. Because he cannot show that any vessel was in any manner defective, the plaintiff cannot demonstrate that any of defendants' vessels were unseaworthy.

"7. Plaintiff's failure to identify any substance aboard any of defendants' vessels as the causative agent of his occupational asthma also prevents plaintiff from prevailing on his claim for negligence. It follows logically that if plaintiff cannot identify any substance aboard any of defendants' vessels as the cause of his alleged injury, he cannot prove that defendants knew or should have known of the presence of any substance aboard

their boats which was supposedly harmful to the plaintiff.

"8. The court, alternatively, concludes that the plaintiff cannot recover from defendants because there can be no recovery for injuries which result from allergic or idiosyncratic reactions to otherwise harmless substances.

"9. The general maritime law is instructed and influenced by the common law, including the law of products liability. See Miller v. American President Lines, Ltd., [989 F.2d 1450] (6th Cir. 1993), [cert. denied, 114 S.Ct. 304 (1993)]. The standard of absolute liability imposed on manufacturers of products is essentially identical to the standard of absolute liability imposed on vessel owners. Given the essential sameness of standards of liability applicable in products liability law and in maritime actions in which recovery is predicated on unseaworthiness, the court may legitimately look to products liability decisions which have applied that standard.

"10. Under the law of products liability, there is no recovery for injuries which result from allergic or idiosyncratic

reactions to otherwise harmless substances. Griggs v. Comb, Inc., 456 So.2d 790 (Ala.1984) (stating that '[i]f the injured person was one who could be described as ultra-sensitive, who suffered an allergic reaction which would be suffered by a very small or insignificant number of people, then the manufacturer would not be held liable'); Gordon v. Proctor & Gamble Distrib. Co., 789 F.Supp. 1384 (W.D. Ky. 1992) (noting that the general rule is 'that a plaintiff's unusual or rare idiosyncratic sensitivity does not provide a basis for recovery under any theory of product liability").

"11. Plaintiff cannot recover for his alleged occupational asthma because the very nature of that condition is an allergic or idiosyncratic reaction to otherwise harmless substances.

"BASED on the foregoing findings of fact and conclusions of law, and having found that there is no genuine issue of fact to be submitted to the trial court, and having concluded that defendants are entitled to [a] judgment as a matter of law, it is hereby:

"ORDERED that defendants' Motion for a Summary Judgment is in all respects GRANTED, and summary

> judgment is hereby ENTERED in favor of defendants, and it is further
>
> "ORDERED, ADJUDGED, and DECREED that the clerk of this court enter a final judgment upon the order herein, whereby the plaintiff shall take nothing from defendants....
>
> "Dated this 16th day of June 1993."

We have reviewed the evidence, the trial court's order quoted above, and the arguments of the parties. The record indicates that there is no genuine issue of material fact and that the defendants were entitled to a judgment as a matter of law. The trial court correctly entered the summary judgment in favor of the defendants. We adopt the trial court's order quoted above as a portion of our opinion.

Short also argues that the trial court erred in failing to provide a hearing on the summary judgment motion, in failing to

give notice that it was taking the summary judgment motion under submission, and in failing to provide a hearing on post-judgment motions. However, because we have concluded that the summary judgment in this case is proper, we hold that any error committed by the trial court in this regard did not prejudice Short and was, therefore, harmless. See Rule 45, A.R.App.P.

AFFIRMED.

Hornsby, C.J., and Maddox, Shores, and Ingram, JJ., concur.

RELEASED

FEB. 4, 1994

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

March 18, 1994

1921522

Anthony Short v. Edison Chouest Offshore, Inc. et al (Mobile: CV-92-001715)

NOTICE

The application for rehearing filed in this cause is overruled. No opinion writtin on rehearing.

STEAGALL, J. - Hornsby, CJ., Maddox, Shores and Ingram, JJ., concur.